

1 ordered that his sentence run concurrently with Movant's state sentences in Case Nos. CR-4004 and
 2 4476.

3 The general rule is that a writ of habeas corpus or a § 2255 motion will not be allowed to be a
 4 recapitulation or substitute for an appeal. See Reed v. Farley, 512 U.S. 339, 354 (1994); Daniels v.
 5 United States, 26 F.3d 706, 711 (7th Cir. 1994). If a movant failed to raise on appeal the claims now
 6 at issue in the § 2255 motion, review is even more limited. Non-constitutional and non-jurisdictional
 7 claims that could have been raised on appeal, but were not, may not be asserted in a § 2255 motion.
 8 See Stone v. Powell, 428 U.S. 465, 477 n.10 (1976); see, e.g., United States v. Schlesinger, 49 F.3d
 9 483, 484-86 (9th Cir. 1994) (concluding that non-constitutional, sentencing errors that have not been
 10 raised on direct appeal have been waived and generally may not be reviewed by way of 28 U.S.C.
 11 § 2255).

12 In contrast, constitutional claims cannot be denied solely on the ground that the movant failed
 13 to raise them in his direct appeal. See Davis v. United States, 417 U.S. 333, 345 n.15 (1974). Where
 14 a movant fails to raise his constitutional claims on direct review, a § 2255 motion is available but
 15 only if the movant establishes either "cause" for the waiver and "actual prejudice" resulting from the
 16 alleged violation or "actual innocence." See Bousley v. United States, 523 U.S. 614, 622 (1998);
 17 United States v. Frady, 456 U.S. 152, 167 (1982).

18 Here, Movant failed to raise this claim on direct appeal and it is waived. Furthermore, since
 19 Movant's factual assertions are erroneous, he cannot show cause and prejudice, because there was no
 20 error for his able attorney to raise on appeal. Therefore, Movant's motion must be denied.

21 Accordingly, IT IS HEREBY ORDERED that Movant's Motion to Vacate, Set Aside, or
 22 Correct a Sentence (#44) is **DENIED**.

23 DATED this 4TH day of September 2007.

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Kent J. Dawson
 United States District Judge